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No. 657

In the Supreme Court of the United States

OCTOBER TERM, 1960

CITY OF KANSAS CITY, KANSAS, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

and

GEORGE ZANE, JR., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the District of Kansas

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MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the Solicitor General, on behalf of the United States, the Secretary of the Interior, and the Wyandotte Tribe of Oklahoma, respectfully moves that the judgment of the United States District Court for the District of Kansas be affirmed on the ground that the questions in this case are so unsubstantial as not to require further argument.

STATEMENT

These two suits were instituted in July 1959 by the City of Kansas City, Kansas, and the individual appellants to have Section 5(c) of the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C. 795(c), declared unconstitutional and to enjoin the defendants from acting under that section.[1] The section authorizes the Secretary of the Interior to transfer or sell the Huron Place Cemetery in Kansas City, Kansas, upon the request of the Wyandotte Indian Tribe of Oklahoma. Because the suit sought an injunction restraining the operation of an Act of Congress as unconstitutional, a three-judge district court was convened pursuant to the provisions of 28 U.S.C. 2282 and 2284. On September 28, 1960, the three-judge court issued findings of fact and an opinion. It held that the complaints failed to state a cause of action giving the court jurisdiction and that the defendants' motions to dismiss the complaints should be sustained (Jurisdictional Statement, pp. A1-A9). On October 13, 1960, the court entered final judgment sustaining the motions to dismiss (R. 50). Appellants filed notices of appeal from this judgment on November 16, 1960, invoking the jurisdiction of this Court under 28 U.S.C. 1253 (R. 52).

The two complaints state that the Huron Place Cemetery has existed as the Wyandotte National Burial Ground since 1843 and that it was explicitly reserved for that purpose by Article 2 of the Treaty

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[1] The statutory provision is set out in an appendix to the Jurisdictional Statement (p. A12).

of January 31, 1855, 10 Stat. 1159, between the Wyandotte Tribe of Indians and the United States. Article 1 of the Treaty provided that, upon ratification of the Treaty, the Tribe was to be dissolved and its members made citizens of the United States. By Article 2, the Wyandotte Nation ceded the land to the United States for subsequent subdivision, in severalty, to qualified Indians, "except as follows, viz: The portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose * * *." The word "public," the complaints allege, refers only to members of the Wyandotte Indian Nation and their descendants, and the cemetery has always been limited to their use. Both complaints allege that several hundred descendants of the Wyandotte Indian Nation, including the five individual plaintiffs, live in Kansas City, Kansas, and that they have a valuable, personal and vested right, guaranteed by the Treaty of 1855, to be buried without cost in the cemetery.

Under the authority of the Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. 503, the Secretary of the Interior, in 1937, issued a corporate charter creating the Wyandotte Tribe of Oklahoma. But both complaints allege that the Wyandotte Indian Nation had ceased to exist by virtue of the Treaty of 1855 and that the Department of the Interior's consistent dealings with, and treatment of, the members of the Wyandotte Tribe of Oklahoma as representatives of all the Wyandottes are "false, fraudulent, presumptive, arbitrary and invalid for the reason that such people are but a minor portion of those of Wyandotte

descent for whom the cemetery was reserved." The five individual plaintiffs in Number KC-1280 allege that they are descendants of the Wyandotte Indian Nation and that the action is brought for the benefit of all interested persons, and further that the Wyandotte Tribe of Oklahoma has never represented all the Wyandotte descendants. This complaint also indicates that the five individual plaintiffs had sought to be placed on the rolls of the Wyandotte Tribe of Oklahoma but had been excluded (see Jurisdictional Statement, p. 11).

Each of the two complaints alleged that the Wyandotte Tribe of Oklahoma has on many occasions stated its intention to remove the remains of the persons buried in the cemetery and to sell the property for commercial purposes, as they are empowered to do by the challenged statute, and that this would destroy the cemetery and make it unavailable to the descendants of those Wyandottes who were parties to the Treaty of 1855. Such action, it is complained, would deprive the individual plaintiffs (and persons similarly situated) of their property without due process of law and deny them the equal protection of the laws. In addition, the City of Kansas City states as a second count in Number KC-1279 that the challenged statute is an attempt to abrogate a contract between the city and the United States under which the city has maintained the cemetery as one of its own parks. By the destruction of the cemetery, this count concludes, the citizens of Kansas City and of the entire nation would suffer an irreparable loss to their common historical heritage.

The United States Attorney, on behalf of the United States, the Secretary of the Interior, and the Wyandotte Tribe of Oklahoma, which were named as defendants together with the local register of deeds, filed motions to dismiss each suit on several grounds. The three-judge court, passing questions as to jurisdiction over the parties, held that the statute was constitutional and that the power of Congress to enact it could not be contracted away.

ARGUMENT

The principles governing this case are well established and plainly required dismissal of the appellants' complaints.

1. This Court has frequently held that the power of Congress over the disposition of Indian lands is plenary and political, and therefore not subject to judicial control. In *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308, this Court said:

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

See, also, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-567.

Conley v. *Ballinger*, 216 U.S. 84, relied upon by the court below, is but an application of this general principle to the particular factual situation presented here. Mr. Justice Holmes, speaking for the Court, noted that the Huron Place Cemetery was in the

same legal status after the Treaty of 1855, 10 Stat. 1159, as it had been before the Treaty:

> There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. * * * [216 U.S. at 90.]

Since the legal status of the cemetery has not changed since *Conley* v. *Ballinger*, the court below was correct in following that case and in stating:

> [W]hether the cemetery is to be continued rests in the exercise of the sound discretion of Congress, a discretion which an individual Indian may not challenge and the exercise of which confers no cause of action which may be asserted in a court of law. [Jurisdictional Statement, p. A8.]

Moreover, even assuming that a suit would lie to obtain just compensation under the Fifth Amendment, as in *Sioux Tribe* v. *United States*, 316 U.S. 317, and *United States* v. *Creek Nation*, 295 U.S. 103, no injunction to prevent an alleged taking may issue. *Hurley* v. *Kincaid*, 285 U.S. 95.[2]

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[2] If appellants were suing for just compensation on the theory that their property had been taken, the district court would not be the proper forum. The district court's Tucker Act jurisdiction is limited to suits for less than $10,000, 28 U.S.C. 1346(a)(2), but appellants have alleged that the amount in controversy exceeds that amount.

2. The district court's dismissal of the suits was also proper because it did not have jurisdiction over three of the defendants, one of which, the United States, is an indispensable party. The suit affects lands in which the United States has an interest and therefore the United States is indispensable. *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282; *Maricopa County* v. *Valley Bank*, 318 U.S. 357, 362; *Osage Tribe* v. *Ickes*, 133 F.2d 47 (C.A. D.C.). Appellants seek to find congressional consent to suit in the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. 345 (Jurisdictional Statement, pp. 16, A17). But this statute gives the district courts jurisdiction only over suits involving rights to allotments of Indian land under any law or treaty. By the terms of Article 2 of the Treaty of 1855, 10 Stat. 1159, to which appellants trace their rights, the Huron Place Cemetery was explicitly excluded from the Wyandotte land ceded to the United States for subdivision in severalty to the members. Thus it was never subject to allotment.

As to the other two defendants, the official residence of the Secretary of the Interior is the District of Columbia, and he is not subject to service or amenable to suit in his official capacity anywhere else. *Butterworth* v. *Hill*, 114 U.S. 128, 132; *Blackmar* v. *Guerre*, 342 U.S. 512, 516. Service on the Wyandotte Tribe of Oklahoma was attempted under 28 U.S.C. 1655, which provides for service on out-of-state defendants in actions "to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property * * *."

This provision plainly provides for service on absent defendants only in actions *in rem*, not *in personam*. Appellants' suits sought an injunction against the Tribe itself and so did not come within the meaning of 28 U.S.C. 1655.[3]

3. Finally, the appellants lacked standing.

The five individual plaintiffs allege that they are descendants of the Wyandotte Indian Nation, but at the same time admit that they are not members of the Wyandotte Tribe of Oklahoma which Congress regards as the equitable owner of the cemetery. The exclusion of the individual plaintiffs from the final roll left them outside the Tribe and therefore left them without standing to challenge either tribal or congressional plans for the disposition of tribal property.

The City of Kansas City, Kansas, has no standing to bring a suit on behalf of some of its citizens who happen to be of Wyandotte descent. Any dispute affecting the rights of these people is between them and the Wyandotte Tribe, or between them and the

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[3] The Charter of the Wyandotte Tribe, which was adopted under the 1936 Act, provides in Section 3(b) that the Tribe has the corporate power to sue and be sued, subject to the proviso:

> That the grant or exercise of such power shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Thus Congress has not consented to the bringing of this type of suit against the Wyandotte Tribe. See *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 512; *Turner* v. *United States*, 248 U.S. 354, 358.

United States, and "it is no part of [the city's] duty or power to enforce their rights in respect of their relations" with either of these sovereigns. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486. Whatever standing the city has to maintain an action arises not from the fact that some of its citizens may be Wyandottes, but from the fact that it is a party to a contract with the United States. Although this contractual status might give the city standing to sue for proper relief in the proper forum, it does not give it a right to the relief it seeks here, the United States not having consented to suits for specific relief. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704.[4]

CONCLUSION

For the foregoing reasons, it is believed that there is no substantial question involved and that the judgment of the district court should be affirmed.

Respectfully submitted,

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FEBRUARY 1961.

[4] As to the merits of the contractual claim, we believe that the District Court correctly construed the contract as not requiring the government "to maintain the cemetery permanently, or for any period of time" (Jurisdictional Statement, p. A8).

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